

# PROVIDER REIMBURSEMENT REVIEW BOARD HEARING DECISION

ON-THE-RECORD

2001-D13

**PROVIDER -**

Baptist Memorial Medical Center  
Little Rock, Arkansas

Provider No. 04-0036

**vs.**

**INTERMEDIARY -**

BlueCross BlueShield Association/  
Blue Cross and Blue Shield of Arkansas

**DATE OF HEARING-**

Live Hearing Held - April 27, 2000

Record Hearing Held - January 3, 2001

Cost Reporting Periods Ended -

December 31, 1991; December 31, 1992;

December 31, 1993 and December 31, 1994

**CASE NOS.** 95-2033, 96-1979,

## INDEX

	Page No.
Issue.....	2
Statement of the Case and Procedural History.....	2
Provider's Contentions.....	8
Intermediary's Contentions.....	19
Citation of Law, Regulations & Program Instructions.....	21
Findings of Fact, Conclusions of Law and Discussion.....	24
Decision and Order.....	29

ISSUE:

Were the Intermediary's adjustments disallowing pass-through cost reimbursement of nursing education costs proper?

STATEMENT OF THE CASE AND PROCEDURAL HISTORY:

Baptist Memorial Medical Center (AProvider@), located in Little Rock, Arkansas, appealed the denial by Blue Cross and Blue Shield of Arkansas (AIntermediary@), of the Apass-through@ of approved nursing education costs. The Provider is one of several hospitals owned and operated by Baptist Health, Inc. (formally Baptist Medical System). Baptist Medical System, Inc. (ABMS@) is an Arkansas not-for-profit corporation.<sup>1</sup>

Baptist Medical System, Inc. owns and leases hospitals.<sup>2</sup> The Aowned@ hospitals are not owned through any subsidiary corporation, but are part of and are operated directly by Baptist Medical System, Inc. Id. The corporation Baptist Medical System, Inc., holds the Medicare provider numbers and provider agreements.<sup>3</sup> The hospitals operated by the corporation Baptist Medical System, Inc. in 1993 included Baptist Medical Center (ABMC@), Baptist Rehabilitation Institute (ABRI@), Baptist Memorial Medical Center (the AProvider@ in this case), and Baptist Medical CenterBArkadelphia (AArkadelphia@ or ABMC-A@).<sup>4</sup> None of these hospitals has its own separate corporation; all are simply assets or divisions of Baptist Medical System, Inc.<sup>5</sup> Baptist Medical Center, Baptist Rehabilitation Institute, Baptist Memorial Medical Center (the AProvider@), and Baptist Medical CenterBArkadelphia are assumed names, or Ad/b/a@s, of Baptist Medical System, Inc.<sup>6</sup> BMS is not a governmental entity, college, university, public school district, or similar educational entity, and is not

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1 Exhibit P-6 at & 4); Transcript (ATr.@) at 28.

2 Id. at & 5; Tr. 28-31.

3 Id.; Tr. 31.

4 Id; Tr. 30.

5 Id.; Tr. 32

6 Id.; Tr. 33.

operated by any such entity.<sup>7</sup> For the Provider's fiscal year ended December 31, 1993, the Intermediary reclassified nursing education expense disallowing the "pass-through" of these costs.<sup>8</sup>

During the cost year ending 12/31/93, the nursing school whose educational costs are at issue in this case, was known as Baptist Medical System School of Nursing (BMSSN or School of Nursing). It is now known as Baptist Health School of Nursing.<sup>9</sup>

Prior to 1982, BMC and the Provider were both reimbursed on a cost basis for nursing education costs.<sup>10</sup> In 1982, Medicare began requiring a home office cost report for BMS.<sup>11</sup> The costs of the nursing school, as well as certain other costs that related to all of the hospitals operated by BMS, were put on the home office cost report and allocated to the various hospitals.<sup>12</sup> The Provider, BMC, and BRI all received allocations of nursing school costs and received reimbursement on a pass-through

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7 Id.

8 Provider Exhibits P-2 and P-3.

9 Provider Exhibit P-6 at & 3); Tr. 28.

10 Tr. 34-35.

11 Tr. 53.

12 Tr. 35.

basis.<sup>13</sup> This was done with the knowledge and approval of the fiscal intermediary, which viewed the nursing school as provider operated.<sup>14</sup>

In 1983, the Prospective Payment System (APPS) went into effect. In that year also, HCFA issued a transmittal revising the manual provisions relating to costs of approved educational activities, and stating the conditions under which reimbursement would be made for classroom and clinical costs for provider operated programs, and for classroom and clinical costs for nonprovider operated programs. Provider Reimbursement Manual, Part 1, (HCFA Pub. 15-1) ' 404.2. The revised manual eliminated the old Alegal operator@ provision for purposes of determining reimbursement for nursing education and allied health costs. It provided that classroom and clinical education costs are allowable for provider operated programs; that clinical education costs are allowable for nonprovider operated programs; and that classroom costs are allowable for nonprovider operated programs if 1) there is no redistribution of nonprovider costs to providers; 2) the provider is receiving a benefit; and 3) the provider's costs for the program are less than if it operated a program of its own. Id.

In 1984, HCFA promulgated an amendment to the regulations (now codified as 42 C.F.R. ' 413.85(d)(6)); which classified costs of Aapproved educational activities@ as operating costs rather than pass-through if they constituted AClinical training of students not enrolled in an approved education program operated by the provider...@ 42 C.F.R. ' 413.85(d)(6). Provider Exhibit P-10.

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13 Provider Exhibit P-4 at & 3.

14 Tr. 171.

In August and September of 1990, there was an exchange of correspondence between BMS and the HCFA Regional Office (ARO), in which the RO took the position that possibly none of the nursing school clinical costs were allowable as pass-through education costs because the nursing school costs were shown on the home office cost report and thus the school was not provider operated.<sup>15</sup> The letter from the RO relied upon 42 C.F.R. 413.85(d)(6).

Effective October 1, 1990, Congress passed the Omnibus Budget Reconciliation Act of 1990 (OBRA '90). Among other things, OBRA '90' essentially provided that providers that had claimed passthrough reimbursement for clinical education costs reporting periods ending on or before October 1, 1989, would be reimbursed for those costs in years beginning subsequent to October 1, 1990.

In response to the HCFA RO's letter denying reimbursement if the costs of the school were left on the home office report, the costs of the nursing school were put back on BMC's books (where they had been prior to the establishment of the home office report), effective January 1, 1991.<sup>16</sup> For Medicare cost reporting purposes during and after 1991, an allocation was made from Baptist Medical Center to the other hospitals, including the Provider, at which nursing education is provided.<sup>17</sup> However, pass-through reimbursement based on that allocation was denied for the Provider and BRI; only BMC was reimbursed on a pass-through basis in 1991 and thereafter.<sup>18</sup> It should be noted that it was Medicare's position at this time, and at the time of hearing, that none of the costs of nursing education in 1990 and before could be recouped from BMC or the Provider due to OBRA '90.<sup>19</sup>

When costs of the School of Nursing were allocated to the Provider, BMC, and BRI from the home office report, the allocation was made by using clinical assigned time as a statistic on the cost reports.<sup>20</sup>

The Medicare treatment during that time period was that all of the institutions, including the Provider, were reimbursed as a provider-operated School of Nursing on a pass-through basis.<sup>21</sup> This continued from the time that the home office cost report was instituted in the mid 1980s through the 1990 cost

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15 Intermediary Exhibit I-1; Provider Exhibit P-24.

16 Provider Exhibit P-4 at & 6; Provider Exhibit P-6. at & 11; Tr. 40, 140.

17 Provider Exhibit P-6 at & 11; Tr. 40-41.

18 Tr. 41.

19 Tr. 169-70.

20 Provider Exhibit P-4 at & 3); Tr. 137.

21 Id.; Tr. 171.

year. Id. After January 1, 1991, essentially the same methodology was used to allocate the costs from BMC's books among the Provider, BMC, and BRI, and the types of costs included were similar.<sup>22</sup>

In 1992, HCFA Pub. 15-1 ' 404.2 was amended and reissued to incorporate the Anonrecoupment@ provisions of OBRA '90. The substantive provisions regarding reimbursement for clinical and classroom costs for programs operated by providers and nonproviders were not changed in the reissuance. See Provider Exhibit P-12.

In 1992, a proposed regulation addressing nursing and other allied health education costs, including a proposed definition of Aprovider operated,@ was published in the Federal Register.<sup>23</sup> That proposed regulation, which would have amended and replaced portions of 42 C.F.R. ' 413.85, has never been finalized by publication of a final rule.<sup>24</sup> The section of the proposed regulation dealing with the definition of Aoperated by the provider@ was proposed in 42 C.F.R. ' 413.85(e).<sup>25</sup> That section was cited by the Intermediary when it made its audit adjustment in 1993 reclassifying nursing education costs of the Provider to a non-pass-through line.<sup>26</sup> The Intermediary's workpapers also cited 42 C.F.R. ' 413.85(e) in denying pass-through reimbursement, stating that ABaptist Medical Center is the operator of these programs, not Baptist Memorial . . . @ .<sup>27</sup> The existing version of 42 C.F.R. ' 413.85(e) in effect for the 1993 cost year

(and to date) does not address the issue of whether a program is provider operated or not.<sup>28</sup>

The denial of pass-through reimbursement to the Provider continued in subsequent years, including 1993, the cost year at issue in this appeal.<sup>29</sup> The audit adjustments reclassifying the Provider's costs

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22 Provider Exhibit P-6 at && 9, 11); Tr. 41.

23 57 Fed. Reg. 43659 (Sep. 22, 1992); Provider Exhibit P-29; Intermediary Exhibit I-9.

24 Tr. 8, 22.

25 Provider Exhibit P-29; Intermediary Exhibit I-9; Tr. 181.

26 Provider Exhibit P-2, p. 2 of 17; Tr. 183-84.

27 The Provider notes in its Post Hearing brief at 8 that the workpaper in Provider Exhibit P-27 was for 1992 rather than 1993. The Provider asserts that it was informed that the Intermediary's workpaper for 1993 cannot be located by the Intermediary. The Provider believes that there appears to be no differences in the treatment of nursing education costs at the Provider by the Intermediary between 1992 and 1993.

28 See Provider Exhibit P-10; Tr. 183.

from pass-through to ordinary operating costs are contained in Provider Exhibit P-2, Adjustments 13-16. The audit adjustments cite as their basis 42 C.F.R. ' 413.85(e).

In summary, there appears to be no dispute between the parties in this case about whether the educational costs at issue are Approved educational costs of the kind ordinarily allowable as pass-through costs under the Medicare program.<sup>30</sup> Similarly, it does not appear to be an issue as to whether the nursing program results in redistribution of nonprovider costs to providers<sup>31</sup>, whether there is a benefit to the Provider from the nursing program<sup>32</sup>, and whether it would be less expensive for the Provider to operate its own nursing education program only at that hospital itself.<sup>33</sup> The parties also agree that OBRA '90 prevented recoupment of nursing education costs at Memorial for 1990 and prior years.<sup>34</sup>

The Provider timely appealed the Intermediary's adjustments from the Notice of Program Reimbursement (NPR) to the Provider Reimbursement Review Board (ARRB) and has met the

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29 Provider Exhibit P-4 at ' 8; Tr. 142.

30 Intermediary Position Paper at 4; Provider Exhibit P-5 at ' 3 & 4; Provider Exhibit P-6 ' 9; Tr. 168.

31 Provider Exhibit P-24; Tr. 194-96.

32 Provider Exhibit P-5 at ' 24; Tr. 169; 62-66.

33 Provider Exhibit P-5 at ' 23; Tr. 85-90.

34 Tr. 169-70.

jurisdictional requirements of 42 C. F. R. ' ' 405.1835-.1840. The Medicare reimbursement impact for the 1993 cost year is estimated at \$250,000.<sup>35</sup>

The Provider was represented by Dan M. Peterson, Esquire, of Fulbright and Jaworski L. L. P. The Intermediary was represented by Bernard M. Talbert, Esquire, of the Blue Cross and Blue Shield Association.

STIPULATION BETWEEN THE PARTIES REGARDING 1991, 1992, & 1994 APPEALS:

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35 Provider Exhibit P-1; Intermediary Position Paper at 2.



The record includes an executed stipulation between the Provider (Baptist Memorial Medical Center) and the Blue Cross and Blue Shield Association in which the parties have stipulated that the outcome of the 1991, 1992, and 1994 cost year appeals will be the same as for the instant case, the 1993 cost year appeal.<sup>36</sup> The Parties have recognized that the issue of the propriety of pass-through reimbursement for nursing education would be similar for several cost years and ought to be treated similarly. Following are the salient points of the stipulation:

The parties, therefore, agree and stipulate as follows:

1. The parties recognize that the following cases are currently pending before the Board, which involve the propriety of the pass-through of nursing education costs for Baptist Memorial Medical Center (AProvider@):
2. Baptist Memorial Medical Center v. Blue Cross and Blue Shield of Arkansas, Provider No. 04-0036, FYE 1991, PRRB Case No. 95-2033 (A1991 Case@)  
  
Baptist Memorial Medical Center v. Blue Cross and Blue Shield of Arkansas, Provider No. 04-0036, FYE 1992, PRRB Case No. 96-1979 (A1992 Case@)  
  
Baptist Memorial Medical Center v. Blue Cross and Blue Shield of Arkansas, Provider No. 04-0036, FYE 1993, PRRB Case No. 97-1498 (A1993 Case@)  
  
Baptist Memorial Medical Center v. Blue Cross and Blue Shield of Arkansas, Provider No. 04-0036, FYE 1994, Case No. 98-2049 (A1994 Case@)
3. The 1993 Case was heard by the Board on April 27, 2000, and has now been submitted to the Board for decision.
4. At the April 27, 2000, hearing, the Chairman of the Board inquired as to the feasibility of the parties=entering into an agreement whereby the decision on the nursing education issue in other pending cases would be governed by the outcome of the 1993 Case. The parties advised that such an agreement should be feasible, and the Chairman thereafter requested that the parties present the Board with such an agreement.

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36 Stipulation dated October 5, 2000 between Counsel for Provider and Blue Cross and Blue Shield Association.

5. The parties therefore agree that the 1991 Case, the 1992 Case, and the 1994 Case will be heard on the record pursuant to Board Instructions Part III.A.2., and that the outcome of those cases will be identical to the outcome in the 1993 Case with respect to the nursing education pass-through issue.
6. The record created in the 1993 Case shall be deemed to be the record in the 1991 Case, the 1992 Case, and the 1994 Case, provided that:
  - a. all facts and references in the record pertaining to the 1993 Case and 1993 Cost Year shall (unless clearly inappropriate, such as dollar amounts for audit adjustments) be deemed to apply to the particular cost year at issue in each of those appeals, respectively;
  - b. any filed cost reports and/or audited cost reports for the 1991 Case, 1992 Case, and 1994 Case not previously filed with the Board shall be filed by counsel for Baptist Memorial within ten (10) days after the execution of this stipulation, and shall be incorporated in the record for each of those appeals;
  - c. the estimated amount in controversy for each appeal shall be the amounts stated in the position papers filed by the Provider in each case as the amount allocated to the Provider and disallowed for pass-through reimbursement, and any other relevant dollar amounts will be determined in accordance with the cost reports for the year in question.

With the modifications above noted, the record in the 1993 Case shall serve as the record for any review by the Administrator of HCFA, and for any judicial review thereafter, and shall be included in any official record of those cases prepared by the Board for later review.

6. Based upon the discussions at the April 27, 2000, hearing, it is the expectation of the parties that the Board, if possible, will issue decisions in the 1991 Case, 1992 Case, and 1994 Case at the same time as a decision is issued in the 1993 case, and if that is not possible, the parties request by this Stipulation that such decisions be issued as near in time to the 1993 decision as may be feasible under the Board's schedule.
7. The parties hereto represent that all other issues in the 1991, 1992, and/or 1994 Cases have been administratively resolved.

## PROVIDER'S CONTENTIONS

The Provider relies on six principal arguments in this appeal. Generally speaking, these arguments are independent of each other; that is, should the Board decide that the Provider must prevail on any one of them, the Provider contends that the Intermediary's adjustment disallowing the pass-through must be reversed. However, because the Administrator has reversed this Board's decision in at least one other recent case involving pass-through nursing education costs, Northwest Medical Center v. Blue Cross and Blue Shield of Arkansas, and Blue Cross and Blue Shield Association, PRRB No. 99-D55, June 30, 1999, CCH Medicare & Medicaid Guide, New Developments, ¶ 80,326, (Provider Exhibit P-36), reversed by Adm'r PRRB No. 99-D55 August 31, 1999, CCH Medicare & Medicaid Guide, New Developments, ¶ 80,336, (Intermediary Exhibit I-8), the Provider respectfully requests that the Board address all of the arguments raised by it. See also Rapid City Regional Hospital v. Blue Cross and Blue Shield Association/Wellmark/Blue Shield of Iowa, Order of the Adm'r, May 30, 2000. Provider Exhibit P-42.

First, the Provider contends that this nursing education program is operated by a provider, namely, Baptist Medical System, Inc. The Provider asserts that it, Baptist Medical Center, and the School of Nursing are simply assets or divisions of the same corporation, Baptist Medical System, Inc. The Provider points out that Baptist Medical System, Inc. has a single Board of Trustees, a single set of officers, and a single tax identification number.<sup>37</sup> The hospitals and the nursing school are simply assets or divisions of that corporation for accounting purposes. Thus, the School of Nursing is Aprovider operated @ because Baptist Medical System, Inc. is a Medicare provider. The Provider asserts that the particular hospitals it operates, and the School of Nursing it operates, have no legal existence apart from the corporation itself.

The Provider contends that corporation is the legal entity that is both Baptist Medical Center, the Provider, and the School of Nursing. The Provider further contends that this corporation holds the Medicare provider numbers, and is the legal entity that holds the provider agreements with Medicare.<sup>38</sup> The Provider argues that ABaptist Medical Center @ and ABaptist Memorial Medical Center @ (the AProvider @) are simply assumed names or Ad/b/a@s of the corporation Baptist Medical System, Inc., as is the School of Nursing itself. It is the Provider's position that the nursing program is not operated by a university, college, or other Anonprovider @ entity. Accordingly, there is no possibility of improper

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37 Provider at Exhibit P-6 & 10.Tr. 31-32

38 Provider Exhibit P-6 at ¶ 5, Tr. 31.

redistribution of costs from a nonprovider to a provider. Instead, the program is Aprovider-operated,@ and thus entitled to pass-through reimbursement at the Provider level as well as at BMC, because the only legal entity involved here, that encompasses both hospitals and the nursing school, is a Medicare provider.

The Provider asserts that the costs of the Nursing School must initially be placed somewhere. As noted above, they were originally and appropriately on BMC's books, with an allocation made to other hospitals involved in the School of Nursing.<sup>39</sup> In 1982, Medicare required the School of Nursing costs to be placed on a home office report (with allocation of costs to the various hospitals).<sup>40</sup> After BMS did so, HCFA in 1990 then threatened to deny all pass-through on grounds that those costs were on the home office report. Intermediary Exhibit I-1. Accordingly, those costs were returned to the BMC cost report, where they had initially been for approximately 24 years, since the inception of the Medicare program.<sup>41</sup> The Provider contends that an appropriate allocation was made to it and BRI based on a HCFA approved statistic, clinical assigned time.<sup>42</sup> The Provider points out that the Intermediary's witness testified that the Intermediary, as auditor, would not have allowed all of the costs to remain on the BMC cost report, because the services related to other hospitals.<sup>43</sup> Thus, an allocation as was done by BMC in 1993 was necessary and appropriate. The Provider contends that this does not turn the program into a Anonprovider@ operated program.

Indeed, there is no Anonprovider@ anywhere in this arrangement. Thus, there is no risk of redistribution of nonprovider costs to providers, which the Provider contends is the only ill that the Aprovider operated@ requirement was meant to address in the first place.

Second, the Provider notes that the Intermediary has taken the position that BMC (a provider) is Athe@ operator of the program.<sup>44</sup> The Provider points out that the nursing school costs allocated to it in 1993 were allocated from the books of BMC, and BMC is admittedly a Medicare provider.<sup>45</sup> Therefore, the Provider contends that since only providers are involved, and only provider costs are involved, this cannot be anything but a provider operated program.

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39 Tr. 34-35.

40 Tr. 53, Provider Exhibit P-25, p. 2 of 3; Provider Exhibit P-26, p. 2 of 2.

41 Tr.40, 140-41.

42 Tr. 137.

43 Tr. 162, 202.

44 Intermediary Position Paper at 7; Tr. 165, 174-75.

45 Tr. 40-41, 137-41, 151, 165-66.

The Provider believes that the Intermediary has properly allowed pass-through reimbursement at Baptist Medical Center (ABMC®), a sister hospital of the Provider, and has admitted that such pass-through reimbursement at BMC is proper.<sup>46</sup> Thus, the Provider argues that even if Baptist Medical Center, which carries the School of Nursing on its books and on its cost report, were to be considered legally separate from the Provider (which is not the case), the nursing education costs at the Provider would still be reimbursable on a pass-through basis for this provider operated program. The Provider contends that HCFA and the Intermediary have repeatedly admitted that two or more providers may operate a program together and both may be reimbursed.<sup>47</sup> The Provider further contends that Medicare regulations do not specify the degree to which a provider must participate in a program operated by another provider to also be considered as an Aoperator® and to qualify for pass-through reimbursement. The Baptist Medical System School of Nursing is clearly operated only by providers; there are no universities, community colleges, or other Anonprovider® types of entities involved here from which redistribution of costs could occur. The Provider contends that HCFA publications simply do not address the degree of participation that a provider must have in the operation of a nursing school in order to qualify for pass-through reimbursement where only providers are involved. The threshold for participation would be low, the Provider contends, because there is no potential for redistribution of nonprovider costs.

Here, the Provider has shown that nothing but providers are involved in the operation of the program, and the Intermediary has not put on any evidence to the contrary. Indeed, the Intermediary's position is that BMC (a provider) is Athe® operator of the program. Intermediary Position Paper at 7. The nursing school costs allocated to the Provider in 1993 were allocated from the books of BMC, and BMC is admittedly a Medicare provider.<sup>48</sup> Since only providers are involved, and only provider costs are involved, this cannot be anything but a provider operated program.

The Provider points out that HCFA has historically allowed reimbursement to a provider who participated in a nursing education program for which a different provider was the Alegal operator.® In

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46 Intermediary Position Paper at 5; Provider Exhibit P-6 at & 9; Tr. 168.

47 Provider Exhibits P-29, P-30; Tr. 176.

48 Tr. 40-41, 137-41, 151, 165-66.

St. John's Hickey Memorial Hospital, Inc. v. Califano, 559 F.2d 803 (7th Cir. 1979), CCH Medicare & Medicaid Guide, New Developments, &29,733, (St. John's Hickey), the plaintiff hospital had been reimbursed in the past when it had an arrangement with Holy Cross School of Nursing, a provider-operated program which was operated by another Medicare provider, St. Joseph Hospital. In that case, the Intermediary denied reimbursement only after the provider-operated Holy Cross School of Nursing was replaced by a program operated by Anderson College, a nonprovider. As the court noted in St. John's Hickey, 599 F.2d at 808 n.9:

Although plaintiff was also not the legal operator of the Holy Cross School of Nursing, counsel for the Secretary explained in oral argument that the intention was to deny reimbursement only when a nonprovider was a legal operator. Since St. Joseph Hospital, another Medicare provider, was the legal operator of the Holy Cross program, plaintiff's contributions to it were deemed reimbursable.

Id.

The Intermediary nevertheless contends, without citing any regulatory basis, that some (unspecified) degree of control over classroom operations such as curriculum is required for pass-through reimbursement.<sup>49</sup> Although the Provider does not agree with that position, it contends that there was abundant evidence and testimony in this case to show that it has considerable input into the operation of the program, not just from the clinical side but from the standpoint of more academically related matters and the overall operation of the program.<sup>50</sup>

In any event, the Provider contends that it participates substantially in the operation of the nursing education program, as detailed under the arguments relating to the St. John's Hickey line of cases.

Third, even if Baptist Medical Center were a nonprovider (which, again, is not true as a matter of fact), the Provider contends that court decisions and Board precedents would still allow pass-through reimbursement to the Provider under the facts of this case. As demonstrated above, Baptist Medical System, Inc. is a "provider." So is BMC, on whose books the costs of the School of Nursing are shown after 1990 (pursuant to agreement with the Intermediary). The Intermediary states that the School of Nursing is a "provider operated" program even after 1990, being operated by BMC, a provider.<sup>51</sup> Prior to 1990, the School of Nursing was always treated as a provider operated program also, regardless of whether the costs were shown on the books of BMC or on the home office cost

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49 Tr. 164.

50 Tr. 68-70, 74-76, 79-81.

51 Intermediary Position Paper at 7; Tr. 161.

report.<sup>52</sup> It is the Provider's position that pertinent statutes, HCFA regulations, manuals, and Board decisions allow a pass-through when a provider is "engaged in" the operation of an educational program even when that program may be principally operated by a nonprovider. Under St. John's Hickey (Provider Exhibit P-7) and other cases discussed below, the Provider contends that it is "engaged in" the operation of the program to an extent that is more than sufficient to qualify it for pass-through reimbursement, even assuming that BMC is a "nonprovider" (which, again, is not the case). Court cases so holding include St. John's Hickey, *supra*; Los Alamitos General Hospital, Inc. v. Donnelly, 558 F. Supp. 1141 (D.D.C. 1983), *rev'd on separate issue*, 728 F.2d. 539 (D.C. Cir. 1984); Washington Adventist Hospital, Inc. v. Califano, 512 F. Supp. 932 (D. Md 1981); The Archbishop Bergan Mercy Hospital v. Califano, U.S. District Court, District of Nebraska, No. 76-0-446, May 23, 1980, CCH Medicare & Medicaid Guide, ¶ 30,512; Cleveland Memorial Hospital, Inc. v. Califano, U.S. District Court, Eastern District of North Carolina, No. 78-83-CIV-8, Dec. 20, 1979, CCH Medicare & Medicaid Guide, ¶ 30, 487; Butler County Memorial v. Califano, U.S. District Court, Western District of Pennsylvania, No. 78-652-C, Oct 17, 1978, CCH Medicare & Medicaid Guide, ¶ 30,048; Community Hospital of Indianapolis, Inc. v. Califano, U.S. District Court, Southern District of Indiana, No. IP 78-83-C, Aug. 21, 1979, CCH Medicare & Medicaid Guide, ¶ 29,999.

Under such circumstances, the Provider contends that it is considered a joint operator and costs must be passed through. The Provider lists dozens of ways in which it believes it was significantly engaged in the operation of the educational activities of the nursing program.<sup>53</sup>

The Provider also notes in its argument that the HCFA Administrator has recently taken the position that St. John's Hickey, other court cases, and decisions of this Board in pre-PPS cases do not control in post-PPS cases. Northwest Medical Center, PRRB Dec. No. 99-D55 (ADMR), August 31, 1999, CCH Medicare & Medicaid, New Developments, ¶ 80,336. The Administrator stated:

The final decisions of the Secretary in such PPS cases as St. Mary's Medical Center . . . and St. Anne's Hospital . . . fail to recognize that there is a distinction in the use of the term provider operated in determining allowable costs under reasonable cost payment system and the use of the term provider operated in determining when costs are allowable operating costs or allowable pass-through costs, under PPS. Those cases failed to recognize that the criteria for treating nursing education costs as pass-through costs was not at issue in the pre-PPS St. John Hickey case.

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<sup>52</sup> Tr. 34-35; 145-146.

<sup>53</sup> See Provider's Post Hearing Brief pgs.17-24.

For several reasons, the Provider believes that this is an erroneous position.

-The Provider contends there is a consistent line of decisions of this Board which became final decisions of the Secretary in which the St. John's Hickey analysis was applied and which are post-PPS cases. St. Mary's Medical Center (Duluth, Minn.) v. Blue Cross and Blue Shield Ass'n/Blue Cross and Blue Shield of Minnesota, PRRB No. 97-D82 July 15, 1997, CCH Medicare & Medicaid Guide, New Developments, ¶ 45,503; Barberton Citizens Hospital (Barberton, Ohio) v. BCBSA/Community Mutual Ins. Co., PRRB No. 94-D61 July 28, 1994, CCH Medicare & Medicaid Guide, New Developments, ¶ 42,587, St. Ann's Hospital (Westerville, Ohio) v. BCBSA/Community Mutual Ins. Co., PRRB No. 93-D61 July 21, 1993, CCH Medicare & Medicaid Guide, New Developments, ¶ 41,616. In fact, in St. Ann's, St. Mary's, and Barberton, the Secretary's decision specifically considered whether the standards set out in St. John's Hickey continued to apply under PPS reimbursement principles and concluded that they did. The Provider believes that it would be arbitrary to reverse this line of well-settled cases on which providers have relied and have a right to rely.

-The Provider notes that although the HCFA Administrator states that the "criteria" are supposedly different in post-PPS cases for provider-operated, she does not state what these new criteria might be. The Intermediary at the hearing in this case was aware of no final guidance from HCFA on the subject of what constitutes a "provider operated" program.<sup>54</sup>

-The Provider also points out that at the advent of PPS, Congress mandated that all "approved education costs" be passed through. 42 U.S.C. §§ 1395ww(a)(4) and (d); Exhibit P-13. When there was an attempt by regulation (42 C.F.R. § 413.85(d)(6)) to restrict the pass-through of clinical costs for nonprovider operated programs, Congress reacted to protect those costs, by passing OBRA '89 and OBRA '90.



The Provider contends that any attempt to cut off pass-through reimbursement by establishing new, unspecified criteria for post-PPS cases would run counter to Congressional language and intent, as well as the court cases and final decisions of the Secretary mentioned above.

-The Provider notes that the Board has allowed pass-through reimbursement in another case where two or more providers participated in the operation of a nursing education program. Northwest Medical Center v. BCBSA/BCBS of Arkansas, PRRB No. 99-D55 June 30, 1999 CCH Medicare & Medicaid Guide, New Developments, ¶ 80,326, rev'd by Administrator PRRB No. 99-D55, August 31, 1999, CCH Medicare & Medicaid Guide, New Developments, ¶ 80,336, Provider Exhibit P-36. That case is currently on appeal to the United States District Court for the District of Columbia, Civil Action No. 1:99CV02947. The Provider contends that pass-through reimbursement is at least as appropriate in this case, where there was extensive evidence of participation by the Provider in the operation of the program.

Fourth, under the OBRA '90', the Provider contends that HCFA and fiscal intermediaries are prohibited from denying pass-through reimbursement for clinical education costs after October 1, 1990, if certain conditions are met. Paragraph (b)(1) of OBRA '90 ' 4004 stated:

The reasonable costs incurred by a hospital (or by an educational institution related to the hospital by common ownership or control) during a cost reporting period for clinical training (as defined by the Secretary) conducted on the premises of the hospital under approved nursing and allied health programs that are not operated by the hospital shall be allowed as reasonable costs under part A of title XVIII of the Social Security Act and reimbursed under such part on a pass-through basis. (Emphasis added.)

Id. Provider Exhibit P-17.

The Provider contends that the costs in this case are for training Aconducted on the premises of the hospital@ and are Aallowable on a pass-through basis@ even if they were for Aprograms that are not operated by the hospital.@ Thus, the Provider believes it meets the basic requirements under OBRA '90.

The Provider points out that Congressional statute also includes several additional tests, all of which it believes it meets under the facts of this case. According to OBRA '90 ' 4004, ' 4004(b)(2), the costs are reimbursable if:

(A) the hospital claimed and was reimbursed for such costs during the most recent cost reporting period that ended on or before October 1, 1989;

(B) the proportion of the hospital's total allowable costs that is attributable to the clinical training costs of the approved program, and allowable under (b)(1) during the cost reporting period does not exceed the proportion of total allowable costs that were attributable to the clinical training costs during the cost reporting period described in subparagraph (A);

(C) the hospital receives a benefit for the support it furnishes to such program through the provision of clinical services by nursing or allied health students participating in such program; and

(D) the costs incurred by the hospital for such program do not exceed the costs that would be incurred by the hospital if it operated the program itself.

Id.

The Provider contends that it meets (A) above, because it was reimbursed for these costs in its fiscal year ending December 31, 1988.<sup>55</sup> The Provider also contends that it meets (B) above, because the proportion in the current cost year (1993) did not exceed that in 1988.<sup>56</sup> The Provider contends that it meets (C) because the hospital clearly receives such a benefit.<sup>57</sup> Furthermore, the Provider argues that under (D), the costs incurred do not exceed the costs if the hospital were to operate the program itself.

<sup>58</sup> The above provisions, which are all contained in subsection (b) of Section ' 4004 of OBRA '90, Apply to cost reporting periods beginning on or after October 1, 1990.@ OBRA '90 ' 4004(b)(5) <sup>59</sup> Accordingly, OBRA '90 prohibits the action taken by the Intermediary in this case. The Provider asserts that the Intermediary presented no evidence or argument to the contrary.

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55 Provider Exhibits P-21; P-4 at & 4; Tr. 36.

56 Provider Exhibit P-4 at & 13; Tr. 143-144.

57 Provider Exhibits P-5 at & 24; P-20; Tr. 62-66; Tr. 169; Tr. 202-03.

58 Provider Exhibit P-5 at & 23; Tr. 85-89.

59 Provider Exhibit P-17.

The Provider also points out that OBRA '90 contained a provision which prevented recoupment of educational costs between the years 1983 and 1990. On the basis of that prohibition, the Intermediary determined that it should not attempt to recoup nursing education costs incurred by BMC or the Provider.<sup>60</sup> Accordingly, the Provider contends that the conditions of OBRA '90 ' 4004, ' 4004(b)(2) have been met here, and the denial of pass-through reimbursement by the Intermediary for the 1993 cost year is contrary to this United States statute.

Fifth, the Provider contends that the Intermediary based its decision on a non-final rule that is of no legal effect. The Provider points out that the Intermediary's witness testified at the hearing that the audit adjustments were not based on the proposed rule issued in 1992 (57 Fed. Reg. 43659 (Sept. 22, 1992)) relating to reimbursement for education costs.<sup>61</sup> The Provider points out, however, that the audit adjustment itself cites as its authority 42 C.F.R. ' 413.85(E).<sup>62</sup> On cross-examination, the Intermediary's witness confirmed that in the regulation that was actually effective in 1993 (and that remains effective today), the section known as ' 413.85(E) has nothing to do with whether or not an education program is provider operated, but instead deals with a list of approving bodies.<sup>63</sup> In the 1992 proposed rule, however, the Intermediary's witness confirmed that ' 413.85(E) is the section dealing with whether a program is Aprovider operated.@<sup>64</sup> Thus, it appears to the Provider that the Intermediary relied upon a proposed regulation rather than the version of the regulation that was in effect at the time in making the audit adjustments at issue in this case. It seems doubtful that this was a mere typographical error, as suggested by counsel for the Intermediary (Tr. 200), since a workpaper cites the same ' 413.85(E).<sup>65</sup>

As noted in the Intermediary's Position Paper at pg. 7, the Intermediary's witness testified that the 1992 proposed regulation is merely a Aclarification@ of existing HCFA rules or policy.<sup>66</sup> However, on cross-examination regarding the specific elements of what is required under the proposed regulation for

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60 Intermediary Position Paper at 5; Tr. 169-70.

61 Tr. 180.

62 See Provider Exhibit P-2, p. 2 of 13.

63 Tr. 183; Provider Exhibit P-10, p. 2 of 3.

64 Tr. 184-85; see Provider Exhibit P-29, Intermediary I-9.

65 Provider Exhibit P-27.

66 Tr. 180.

a program to be Aprovider operated,@ the witness was unable to cite any source in currently published HCFA guidance for the major elements of the proposed regulations requirements. A comparison with existing manual provisions and regulations can lead to only one conclusion: that the Aprovider operated@ requirements in the proposed 1992 rule are new and different from prior requirements, and are not simply a Aclarification.@

The revised 1992 version of ' 413.85 announces a rule for Anonprovider operated programs@ that purports to be Aeffective for cost reporting periods beginning on or after October 1, 1983 . . . .@ 57 Fed. Reg. 43659 (Sept. 22, 1992). In other words, at the time of its issuance, the regulation purported to be retroactive to cover nine years of prior cost reporting periods, including the cost period at issue in this appeal. As of this writing, it purports to cover seventeen prior years.

The Provider further argues that even if this proposed rule were ever to become final, such a retroactive change in the substantive rules governing payment for nursing education costs is impermissible. Retroactivity is prohibited by, among other things by Bowen v. Georgetown Hospital, 488 U.S. 204 (1988), which prohibits retroactive rulemaking by the Medicare program.<sup>67</sup>

Accordingly, it appears that the action by the Intermediary in this case was founded upon the application of an unpublished rule, that has no legal authority, and that (if ever finalized) could not be applied retroactively to the 1993 cost year.

Sixth, the Provider mounts several legal challenges to the action of the Intermediary and HCFA. It contends that any rule or decision that disallows pass-through reimbursement in situations where only provider (as opposed to nonprovider) costs are involved is arbitrary, capricious, and an abuse of discretion, because in that situation there is no possibility of redistribution of nonprovider costs. Accordingly, any regulation or interpretation thereof that would disallow costs incurred by providers participating in a program composed only of providers is arbitrary, capricious, and unsupported by substantial evidence under the Administrative Procedure Act, 5 U.S.C. ' 706.

The Provider further argues that any regulation, manual provision, or interpretation thereof that categorically denies pass-through of classroom or clinical costs is contrary to statute, because Congress made no such distinction between classroom and clinical costs in 42 U.S.C. ' ' 1395ww(a)(4) and (d). Instead, that statute allows pass-through of the costs of all Aapproved educational activities.@ The Provider points out that when HCFA began to deny clinical training costs in the 1980s for nonprovider-operated programs, Congress reacted vigorously -- not once but twice. In 1989 it imposed a moratorium on recoupment of clinical costs incurred by hospitals. In 1990, it made that

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67 Provider Exhibit P-38.

moratorium indefinite in duration. Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239; Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508. Provider Exhibits P-37, P-17.

Accordingly, the Provider contends that Congress has repeatedly made its intent clear that the entire costs for approved nursing programs should be reimbursable on a pass-through basis. By allowing pass-through reimbursement even when there is a possibility of cost redistribution (for nonprovider programs), Congress= intent to permit pass-through reimbursement where there is no possibility of redistribution (provider programs) is even more evident.

Given this clear congressional mandate, any interpretation by the Intermediary which seeks to disallow pass-through reimbursement for provider-operated programs is Acontrary to law@under the APA, 5 U.S.C. ' 706. Among other things, 42 C.F.R. ' 413.85(d)(6) is directly contrary to 42 U.S.C. ' ' 1395ww(a)(4) and 1395ww(d), by purporting to disallow as pass-through costs that Congress directed be treated as pass-through.

Finally, HCFA=s previous policy was clearly to allow reimbursement to approved education activities when operated by one or more providers, as is the case here. The Provider argues that to change such policy requires rulemaking under the APA (5 U.S.C. ' 551 et seq.) and under the special rulemaking statute applicable to HCFA (42 U.S.C. ' 1395hh). Since HCFA has not proceeded by rulemaking to change the policies contained in HCFA Pub. 15-1 ' 404, and its prior practice allowing multiple providers to be reimbursed, any attempt to do so by administrative fiat violates the requirements that the Secretary proceed by rulemaking when making changes that affect reimbursement.

For the reasons stated above, the Provider believes that the reclassification of nursing education costs by the Intermediary to disallow the pass-through reimbursement for those costs must be reversed.

#### INTERMEDIARY'S CONTENTIONS:

The Intermediary believes that the issue in this case is whether the Provider is the operator of the nursing school. The Intermediary contends that Baptist Medical Center, rather than the Provider, is the operator of the nursing school.<sup>68</sup> The Intermediary points out that it is the Provider=s belief that it is indeed the operator or joint operator, by virtue of its related party status with the school and the other hospitals in the Baptist Health system. The Intermediary disagrees with the Provider=s position that it has control of the activities of the nursing school merely due to its common ownership and ultimate common Board of Directors. If that is the case, then it can also be said that the nursing school has control of the Provider. Both statements are unreasonable and invalid. The Intermediary also contends that the Provider does not have control over the academic factors of the nursing school.<sup>69</sup> The Intermediary notes that the

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68 Intermediary Position Paper at 7, Tr. at 174-175.

69 Tr. at 164.

Provider also claims that it Ahas the authority to remove any instructors or students not following the rules and regulations of the provider@, alluding to its agreement with the nursing school. The Intermediary acknowledges that this would be expected and reasonable in the case of a school operated by a provider. However, the actual agreement merely Adefines the basis on which BMMC will serve as a clinical laboratory (emphasis added) for students of the nursing school.@<sup>70</sup> The Intermediary points out that nowhere in the 1987 agreement is the Provider given the authority to remove any student or instructor itself. The agreement states that one responsibility of the Provider under the agreement is to Arequest the college or school to withdraw any student who is in violation of any of the contractual agreements@. There is no provision at all for the Provider's part in the removal of an instructor. In fact, the Intermediary points out that the Provider's original position paper states that the Memorandum of Agreement Aoutlined the responsibilities of each party in providing clinical experiences for students@, and Awill provide clinical experiences for the educational programs and participate in the development of clinical aspects of the program@ (emphasis added). The Intermediary asserts that is the extent of the Provider's involvement in the operation of the nursing school.

The Intermediary notes that in the Provider=s original position paper at (See Intermediary Exhibit I-5, Section 3.8)<sup>71</sup> it contends that it Aparticipates with the school in evaluation and changes to educational programs@, and has Aconsiderable input with the instructors at the school regarding the clinical activities and classroom subjects@. While it is reasonable to expect that there would be some interaction between the school and the Provider pertaining to the clinical training of the students, such interaction cannot be construed to mean that the Provider operates the nursing school.

The Intermediary points out that the Provider claims that the nursing school gives it access to a qualified pool of nursing personnel, and enhances the quality of patient care at its facility. The Intermediary does not contest these assertions, but does not believe they are the result of, or proof of, the Provider's operation of the nursing school. They are merely beneficial byproducts of participating in the clinical training aspect of the nursing school.

The Provider argues that the Intermediary has relied on HCFA policy which was not in

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70 The Intermediary refers to the agreement between the Provider and Baptist Medical Center, dated July 16, 1987, at Exhibit 3 in the Provider=s original Position Paper submitted on October 30, 1998. The Provider subsequently submitted a revised Position Paper on April 24, 2000. An agreement between the Provider and Baptist Medical Center, dated August 25, 1992, is included at Exhibit 18.

71 The Intermediary is referring to the Provider=s original position paper submitted on August 30, 1998. The Provider subsequently submitted a revised position Paper on April 24, 2000.

effect for the cost reporting period under appeal. Specifically, the Provider cites the proposed rule issued by HCFA on September 22, 1992, to implement the provisions of OBRA 1990. This proposed rule reaffirms the principle that costs of a provider operated program are reimbursable on a pass-through basis. This is supported by HCFA's letter of April 8, 1997, to United States Senator Dale Bumpers (see Intermediary Exhibit I-6).

In that letter, HCFA states:

Awe subsequently established the provider operated criterion in final regulations implementing the Medicare prospective payment system (PPS) on January 3, 1984. In the 1984 PPS final rule, we established payment rates for inpatient hospital services excluding nursing education costs for programs operated by providers. We considered clinical nursing education costs for programs not operated by providers to be normal operating costs which are included in the PPS rates.@

and

Awe specifically stated that other than statutory provisions required by the Omnibus Budget Reconciliation Act of 1990, the September 22, 1992 proposed rule was a clarification of current policy and not a substantive change in our rules.@

From the time that the responsibility for the nursing school was transferred to Baptist Medical Center in 1991, it has been the Intermediary's continued and consistent understanding that the nursing school is operated only by Baptist Medical Center. This is supported by correspondence from the BMC's attorney in 1997 (see Intermediary Exhibit I-7) concerning the establishment of a separate non-profit corporation for the nursing school.<sup>72</sup> The correspondence clearly indicates that the school is controlled and operated by BMC, with no mention whatsoever of the Provider, Baptist Memorial Medical Center. The Intermediary believes it is correct in its determination that the Provider does not operate the nursing school, and as such, is not entitled to pass-through reimbursement for related costs.

In conclusion, the Intermediary asserts that the Provider has not proved that it operates the nursing school. The Intermediary contends that the critical questions in this case are: Is it the operator of the program? Is it the operator of the nursing center?<sup>73</sup> The Intermediary acknowledges that there was some discussion at the hearing about jointly operated programs, however, it contends that no example

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<sup>72</sup> See Intermediary Exhibit I-7; Tr. 166-167.

<sup>73</sup> Tr. 157.

of this was given by the Provider. The Intermediary argues that when one looks at the Provider's history and at the memorandum of understanding between the Provider and the nursing school,<sup>74</sup> it is clear that the Provider's role in the nursing school is an advisory capacity at best.<sup>75</sup> In addition, the Intermediary contends that the clinical activities which take place on the Provider's campus are pretty remote from the day to day operation of the nursing school. Id. The Intermediary contends that since the Provider is not the operator, it does not deserve a pass-through cost. Id. The Intermediary believes that under HCFA's policy applicable to the cost report period in question, the related costs may not be reimbursed as a pass-through. The Intermediary's adjustments to reclassify the costs as operating are required by HCFA's policy.<sup>76</sup> The Intermediary respectfully requests that its adjustments be affirmed by the Board.

CITATIONS OF LAW, REGULATIONS, AND PROGRAM INSTRUCTIONS:

1. Law:

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|-----------------------------------|---|---|
| 5 U.S.C. ' 551 <u>et seq.</u>     | - | Rule Making   |
| 5 U.S.C. ' 706                    | - | Administrative Procedure Act  |
| 42 U.S.C. ' 1395hh <u>et seq.</u> | - | Regulations   |
| 42 U.S.C. ' 1395ww(a)             | - | Limits on Operating Costs for Inpatient Hospital Services                           |
| 42 U.S.C. ' 1395ww(d)             | - | PPS Transition Period; DRG Classification System; Exceptions and Adjustments to PPS |

2. Regulations: 42 C.F.R.

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74 Provider Exhibit 18; Intermediary Exhibit I-3.

75 Tr. 217.

76 Intermediary Position Paper at 8.



- ' 405.1835-.1840 - Board Jurisdiction
- ' 413.85 et seq. - Cost of Educational Activities
- ' 412.113 et seq. - Direct Medical Education Costs

3. Program Instructions - Provider Reimbursement Manual, Part 1 (HCFA Pub. 15-1):

- ' 404 et seq. - Costs of Approved Nursing and Paramedical Education Programs

4. Cases:

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), CCH Medicare & Medicaid Guide, New Developments, &37,541.

St. John's Hickey Memorial Hospital, Inc. v. Califano, 559 F.2d 803 (7th Cir. 1979), CCH Medicare & Medicaid Guide, New Developments, &29,733.

Los Alamitos General Hospital, Inc. v. Donnelly, 558 F. Supp. 1141 (D.D.C. 1983), CCH Medicare & Medicaid Guide, New Developments, &32,455, rev'd on separate issue, 728 F.2d. 539 (D.C. Cir. 1984).

Washington Adventist Hospital, Inc. v. Califano, 512 F. Supp. 932 (D. Md 1981) CCH Medicare & Medicaid Guide, New Developments, &31,470.

The Archbishop Bergan Mercy Hospital v. Califano, U.S. District Court, District of Nebraska, No. 76-0-446, May 23, 1980, CCH Medicare & Medicaid Guide, New Developments, & 30,512.

Cleveland Memorial Hospital, Inc. v. Califano, U.S. District Court, Eastern District of North Carolina, No. 78-83-CIV-8, Dec. 20, 1979, CCH Medicare & Medicaid Guide, & 30, 487.

Butler County Memorial v. Califano, U.S. District Court, Western District of Pennsylvania, No. 78-652-C, Oct 17, 1978, CCH Medicare & Medicaid Guide, New Developments, & 30,048.

Community Hospital of Indianapolis, Inc. v. Califano, U.S. District Court, Southern District of Indiana, No. IP 78-83-C, Aug. 21, 1979, CCH Medicare & Medicaid Guide, New Developments, & 29,999.

St. Mary's Medical Center (Duluth, Minn.) v. Blue Cross & Blue Shield of Minnesota, PRRB No. 97-D82, July 15, 1997, CCH Medicare & Medicaid Guide, New Developments, ¶45,503.

Barberton Citizens Hospital (Barberton, Ohio) v. Blue Cross and Blue Shield Association/Community Mutual Insurance Company, PRRB No. 94-D61-July 28, 1994, CCH Medicare & Medicaid Guide, New Developments, ¶42,587.

St. Ann's Hospital (Westerville, Ohio) v. BCBSA/Community Mutual Insurance Company, PRRB No. 93-D61, July 21, 1993, CCH Medicare & Medicaid Guide, New Developments, ¶41,616.

Northwest Medical Center v. Blue Cross and Blue Shield of Arkansas, and Blue Cross and Blue Shield Association, PRRB No. 99-D55, June 30, 1999, CCH Medicare & Medicaid Guide, New Developments, ¶ 80,326, reversed by Adm. PRRB No. 99-D55 August 31, 1999, CCH Medicare & Medicaid Guide, New Developments, ¶ 80,336.

Rapid City Regional Hospital v. Blue Cross and Shield Association/Blue Cross and Blue Shield of Iowa, PRRB No. 2000-D34, March 24, 2000, CCH Medicare & Medicaid Guide, New Developments, ¶ 80,424; remanded by Adm., May 30, 2000.

5. Other:

57 Fed. Reg. 43659 (Sept. 22, 1992)- Payment for Nursing and Allied Health Education Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, ' 6205.  
Omnibus Budget Reconciliation Act of 1990, Pub. L 101-508, ' 4004.

HCFA's letter of April 8, 1997, to United States Senator Dale Bumpers (Intermediary Exhibit I-6).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION:

The Board, after consideration of the facts, parties' contentions, evidence presented at the hearing and the Provider's post-hearing submission, finds and concludes that the allocation of nursing school costs the Provider received from BMC was appropriately claimed as pass-through medical education costs under PPS consistent with the existing Medicare regulations. The regulation at 42 C.F.R. ' 412.113(b)(1) specifically allows for the payment on a pass-through basis of medical education costs for approved education activities of nurses and paramedical health professionals as described in 42 C.F.R. ' 413.85. The regulations at 42 C.F.R. ' 413.85 set forth the applicable principles for

reimbursing the reasonable costs of educational activities under the Medicare program, and explicitly define the types of approved educational activities that are within the scope of these reimbursement principles. The Board interprets the prerequisite established under 42 C.F.R. ' 412.113(b)(1) to mean that, if a provider can substantiate that its medical education activities meet the conditions set forth in 42 C.F.R. ' 413.85, then the costs associated with such activities will systematically flow through the Medicare program's reimbursement process as an allowed PPS pass-through cost. The Board notes that there were no significant changes to the program instructions, regulations, or statute regarding the allowability of pass-through costs in a nursing school program that would have an impact on the case at issue.

Prior to making its findings and conclusions in this case, the Board focused on the history of where the Provider and nursing school fit in the corporate structure of Baptist Medical System, (ABMS®). The Board also focused on how the nursing school costs have been reimbursed over the years. The following history/chronology of events noted below is part of the evidence included with this case and considered by the Board:

- The record clearly established that Baptist Medical System, Inc. is a single corporation that operates four hospitals. The nursing school is part of this same entity. It is not a separate corporation. BMS holds the Medicare provider agreements for these hospitals and the Medicare provider numbers. The four hospitals (BMC, the Provider, BRI, and BMC-A) are simply assumed names or Ad/b/a@s of the single legal entity Baptist Medical System, Inc. The ABaptist Medical System School of Nursing® is also just an assumed name or Ad/b/a@ of the corporation Baptist Medical System, Inc. This entity holds the nursing school licenses as well.<sup>77</sup>

- Prior to 1982, the costs of the nursing school resided on the books of BMC and were allocated between the Provider and BMC.<sup>78</sup>

- In 1982, Medicare began requiring a home office cost report for BMS.<sup>79</sup> The costs of the nursing school, as well as certain other costs that related to all of the hospitals operated by BMS, were put on the

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77 Tr. 30-33.

78 Tr. 34-35.

79 Tr. 53.

home office cost report and allocated to the various hospitals.<sup>80</sup> The Provider, BMC, and BRI all received allocations of nursing school costs and received reimbursement on a pass-through basis.<sup>81</sup> This was done with the knowledge and approval of the fiscal intermediary, which viewed the nursing school as provider operated.<sup>82</sup>

-In August and September of 1990, there was an exchange of correspondence between BMS and the HCFA Regional Office (ARO@), in which the RO took the position that possibly none of the nursing school costs were allowable as pass-through education costs because the nursing school costs were shown on the home office cost report and thus the school was not provider operated.<sup>83</sup> The letter from the RO relied upon 42 C.F.R. 413.85(d)(6).

-In response to the HCFA RO's letter denying reimbursement if the costs of the school were left on the home office report, the costs of the nursing school were moved to BMC's books (where they had been prior to the establishment of the home office report), effective January 1, 1991.<sup>84</sup> For Medicare cost reporting purposes during and after 1991, an allocation was made from Baptist Medical Center to the other hospitals, including the Provider, at which nursing education is provided.<sup>85</sup> However, pass-through reimbursement based on that allocation was denied for the Provider and BRI; only BMC was reimbursed on a pass-through basis in 1991 and thereafter.<sup>86</sup>

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80 Tr. 35.

81 Provider Exhibit P-4 at & 3.

82 Tr. 171.

83 Intermediary Exhibit I-1; Provider Exhibit P-24.

84 Provider Exhibit P-4 at & 6; Provider Exhibit P-6. at & 11; Tr. 40, 140.

85 Provider Exhibit P-6 at & 11; Tr. 40-41 .

86 Tr. 41.

-When costs of the School of Nursing were allocated to the Provider, BMC, and BRI from the home office report, the allocation was made by using clinical assigned time as a statistic on the cost reports.<sup>87</sup> The Medicare treatment during that time period was that all of the institutions, including the Provider, were reimbursed as a provider-operated School of Nursing on a pass-through basis.<sup>88</sup> This continued from the time that the home office cost report was instituted in the mid 1980s through the 1990 cost year. Id. After January 1, 1991, essentially the same methodology was used to allocate the costs from BMC's books among the Provider, BMC, and BRI, and the types of costs included were similar.<sup>89</sup>

Based on the above evidence, the Board finds that essentially nothing substantive has changed with respect to the operation of the nursing school over the years; it appears to the Board that the only thing that has changed with respect to the the nursing school is the accounting location from where the nursing school costs are allocated. The Board is acutely aware that the nursing school costs must initially be placed somewhere. They were originally included on BMC's books, with an allocation made to other hospitals involved in the School of Nursing. Tr. 34-35; Provider Exhibit P-4 (Golden Dec. at & 3). In 1982, Medicare required the School of Nursing costs to be placed on a home office report (with allocation of costs to the various hospitals). Provider Exhibit P-25, p. 2 of 3; Provider Exhibit P-26, p. 2 of 2; Tr. 53. Then, in 1990, HCFA threatened to deny all pass-through costs on grounds that those costs were on the home office report. Intermediary Exhibit I-1. The costs were returned to the BMC cost report, where they had initially been for approximately 24 years, since the inception of the Medicare program. Tr. 40, 140-41. An allocation was made to the Provider and BRI based on a HCFA approved statistic, clinical assigned time. Tr. 137; Exhibit P-4 (Golden Dec. at & 3). The Board also notes that when the nursing school costs were being allocated from the home office cost report between 1982 and 1990, these costs were allowed as pass-through costs for both BMC and the Provider because the Intermediary considered the nursing school to be provider operated.<sup>90</sup> The Board further notes that the Intermediary's witness testified that the Intermediary, as auditor, would not have allowed all of the costs to remain on the BMC cost report because the services related to other

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87 Provider Exhibit P-4 at & 3); Tr. 137.

88 Id.; Tr. 171.

89 Provider Exhibit P-6 at && 9, 11); Tr. 41.

90 Tr. 170-171.

hospitals.<sup>91</sup> Thus, the Board is convinced that an allocation as was done in 1993 was necessary and appropriate.

Further, the Board finds that that the nursing school is a diploma school of nursing, which is traditionally a hospital based facility, as opposed to a university based/operated school of nursing.<sup>92</sup>

The Board agrees with the parties and concludes that the educational costs at issue in this case are Approved educational costs of the kind ordinarily allowable as passthrough costs under the Medicare program and defined in 42 C.F.R. ' 413.85(b) and (c).<sup>93</sup> The Board also concludes that the nursing school is a formally organized or planned program of study that is usually engaged in by providers in order to enhance the quality of patient care in an institution within the meaning of 42 C.F.R. ' 413.85(b).

The Board notes that the Intermediary's primary position in this case is that the Provider was not A the operator or even A an operator of the nursing program and consequently did not meet the requirement of 42 C.F.R. ' 413.85(d)(6), i.e., that the provider must operate the approved education program. The Board rejects this position. The Board points to evidence in the record that overwhelmingly supports its conclusion that the Provider was engaged in, to a significant extent, the operation of the nursing program. Some of the factors that the Board relied on in making its conclusion were :

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91 Tr. 203.

92 Tr. 117.

93 Intermediary Position Paper at 4; Provider Exhibit P-5 at & 3& 4; Provider Exhibit P-6 & 9; Tr. 168.

The school of nursing, BMC, and the Provider are under the unified control of the Board of Trustees of Baptist Medical System, Inc. This is the governing board of BMC and the Provider, and it also operates the school of nursing as well. Furthermore, the Senior Leadership Team is responsible for the operation of the school of nursing. The Senior Leadership Team is composed principally of the Senior Vice Presidents (that is, Administrators) of the several hospitals within Baptist Medical System, Inc., including BMC and the Provider.<sup>94</sup>

There is also direct, formal liaison and coordination among the various Baptist hospitals, including the Provider and BMC, and the School of Nursing, through the BMS Nursing Council. The Baptist Medical System Nursing Council is composed of representatives from each patient care institution and the two Schools of Nursing. It is an internal council within Baptist Medical System, Inc. In 1993, a representative from the Provider served on this Council, representatives from the Schools, along with representatives of BMC, BRI, and Baptist Medical Center--Arkadelphia.<sup>95</sup>

The Board also points to several factors in the Memorandum of Agreement that demonstrate that the Provider was engaged in the operation of the nursing education program:

1. The Memorandum does not place exclusive responsibility on either party for operation of the program at the Provider, but rather states that the School and the Provider will cooperate in the implementation of education experiences for nursing students (see also Tr. 72);
2. The facilities to be used and the supervision to be furnished are determined by the mutual agreement of the School of Nursing and the Provider;

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94 Tr. 110, 124.

95 Tr. 60, 67-68, 106, 123.

3. The program and its faculty are required to become familiar with the Provider's policies prior to beginning the student experience, and to abide by the Provider's rules and regulations (see also Tr. 74);

See Provider Exhibits P-18 and P-5 (Harris Dec. & 7))

It is the Board's opinion that the above uncontroverted facts, as well as other facts in the record, clearly demonstrate that the Provider was engaged in, to a significant extent, the operation of the nursing education program at issue in this case. This opinion is consistent with the logic presented in the Circuit Court's decision in the St. John's Hickey case, wherein the court found that the joint operation of a nursing program by a provider and university satisfied the regulatory operational requirement. In addition, the Board's ruling in this case is in accord with prior Board decisions on this issue under facts substantially similar to those found here.<sup>96</sup> With the approved programs recognized as an allowable cost, the mechanical process set forth in 42 C.F.R. ' 412.113 allows for the reimbursement of approved medical education activities as pass-through costs.

In conclusion, the Board finds that there was a unified nursing school operation associated with the Provider. The Board believes that the Provider, along with other operating divisions of BMS, was significantly engaged in the operation of the nursing school. The nursing school costs allocated to the Provider were allocated from the books of BMC, and BMC is admittedly a Medicare provider.<sup>97</sup> Since only providers are involved, and only provider costs are involved, the Board concludes that this cannot be anything but a provider operated program.

#### DECISION AND ORDER:

The Intermediary's adjustments disallowing the pass-through of nursing education costs were improper and are reversed. The Provider properly claimed the nursing education costs as Medicare pass-through costs under PPS.

#### Board Members Participating:

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96 Barberton Citizens Hospital v. Blue Cross and Blue Shield Association/Community Mutual Insurance Company, PRRB Dec. No. 94-D61, July 28, 1994, HCFA Admin. Decl. Rev., Medicare and Medicaid Guide (CCH) & 33, 658. St. Mary's Medical Center v. Blue Cross and Blue Shield Association/Blue Cross and Blue Shield of Minnesota, PRRB Dec. No. 97-D82, July 15, 1997, HCFA Admin. Decl. Rev., Medicare and Medicaid Guide (CCH) & 45, 503.

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Page 33  
98-2049

CNs.:95-2033, 96-1979, 97-1498,

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